Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 40

JOHN W. STANFORD, JR.,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE 57TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE 57TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS

BRIEF FOR PETITIONER

Opinion Below

No opinion was rendered by the court below.

Jurisdiction

The judgment of the court below was entered on January 20, 1964 (R. 8-9). A timely motion for a new trial, filed on January 29, 1964 (R. 10-14), was overruled the same day (R. 15). A petition for certiorari was filed in this Court on February 26, 1964. The writ was granted on June 22, 1964. The jurisdiction of this Court rests on 28 U. S. C., Section 1257(3).

Statutes Involved

The statutes involved are Article 6889-3, entitled "The Texas Communist Control Law" (hereafter called the "Control Law"), and Article 6889-3A, entitled "An Act for the Suppression of Communist Party and Related Organizations" (hereafter referred to as the "Suppression Law"), of the Revised Civil Statutes of Texas. They are printed in the Appendix, *infra*.

Questions Presented

I. Whether the seizure of petitioner's books, papers, records and private correspondence, and the search warrant which purported to authorize the seizure, violate the Fourth and Fourteenth Amendments to the United States Constitution, because:

a) There was no probable cause for the issuance of the warrant;

b) The warrant did not specify the crime charged;

c) The warrant did not particularly describe the things to be seized.

II. Whether Section 9 of the Suppression Act is unconstitutional on its face and as applied in this case because it violates the First, Fourth, Fifth and Fourteenth Amendments.

III. Whether Articles 6889-3 and 6889-3A, Revised Civil Statutes of Texas, are superseded by federal legislation.

Statement of the Case

On December 26, 1963, petitioner was served with a report and order of the Subversive Activities Control Board calling for his registration as a member of the Communist Party of the United States pursuant to Section 8 of the Subversive Activities Control Act of 1950, 50 U. S. C. §787 (App. Ex. 1; R. 16-18). On the following day, December 27, 1963, James E. Barlow, Criminal District Attorney, Bexar County, Texas, made application (R. 31, 71-72) in the District Court, 57th Judicial District, Bexar County, for a search warrant "in accordance with Section 9, of Article 6889-3 and Article 6889-3A, Revised Civil Statutes of Texas." After reciting that he had good reason to believe and did believe that petitioner's premises was "a place where books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments [hereafter called "books, [etc.]"] concerning the Communist Party of Texas, and the operations of the Communist Party in Texas are unlawfully possessed and used in violation of Articles 6889-3 and 6889-3A," the application of Mr. Barlow stated that his belief was founded on the following information (R. 71):

> "That this officer has received information from two credible persons that the party named above has such books and records in his possession which are books and records of the Communist Party including party lists and dues payments, and in addition other items listed above. That such information is of recent origin and has been confirmed by recent mailings by Stanford on the 12th of December, 1963 of pro-Communist material."

The application attached an affidavit (R. 31, 70) signed by two persons, Mr. Lonny Zweiner and Mr. V. Murray Jordan, both Assistant Attorneys General of the State of Texas. The affidavit recited that the beliefs of the affiants in the existence on petitioner's property of

> "books [etc.] concerning the Communist Party of Texas and the operations of the Communist Party in Texas . . . unlawfully possessed and used in violation of Article 6889-3 and Article 6889-3A, Revised Civil Statutes of the State of Texas" (R. 70)

were founded upon the following information:

> "Recent mailings by Stanford on the 12th of December, 1963, of material from his home address, such material being identified as pro-Communist material and other information received in the course of investigation that Stanford has in his possession the books and records of the Texas Communist Party" (*ibid.*).

The warrant (R. 31, 72-73), issued by Hon. Solomon Casseb, Jr., Judge, 57th Judicial District, Bexar County, after reciting that the "application [is] . . . in accordance with law," and the allegations made regarding existence of the "books [etc.] concerning the Communist Party of Texas, and the operations of the Communist Party in Texas" and their unlawful possession and use in violation of the Control Law and Suppression Law at the petitioner's home, ordered the executing officers

> "to enter immediately and search the above described premises for such items listed above unlawfully possessed in violation of [the Control Law and the Suppression Law], and to take possession of same."

The warrant was executed on December 27, 1963 in the course of a five-hour search of petitioner's home. About two thousand pieces of literature, books, pamphlets, and other publications were seized.[1] Some of the literature was from petitioner's private library (R. 33), but the great majority consisted of stock from petitioner's book-selling business which was conducted under the name of All Points of View (R. 26, 33-34, 68, 131). Also taken were petitioner's private papers, including correspondence with his attorney (R. 43-44, 107-109) and with the committee supporting his defense against the charges of the Subversive Activities Control Board (R. 44, 111-129), a personal letter to President Kennedy's widow (R. 44, 110), certificate of title to his auto, his marriage certificate, and medical and furniture bills (R. 42, 45-46).[2]

On January 9, 1964, petitioner made application before Judge Casseb for an order to "quash, set aside, and hold for naught" the warrant, and for return of all items seized under it (R. 1-5). Judge Casseb ordered a hearing regarding the search warrant (R. 5-6), which was had on January 17, 1964.

At the hearing, Mr. Lonny Zweiner, one of the signers of the affidavit upon which the warrant issued, upon objection by the State's attorney, was not permitted to answer a ques-

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[1] The material seized is inventoried in the return to the warrant (R. 74-106).

[2] The return shows that among the fourteen boxes of books seized (R. 28) were writings of the following persons: Justice Hugo L. Black (R. 81), Earl Browder, Fidel Castro, Benjamin Davis, Theodore Draper (R. 82), Che Guevara, Pope John XXIII (R. 93), N. S. Khrushchev, V. I. Lenin, Karl Marx and Friedrich Engels, and Jean-Paul Sartre (R. 95). In addition, one of the items seized and listed in the return (1 box cardboard 5" x 4" x 10" containing index cards containing addresses (R. 106)) contained the mailing list assembled by petitioner in his book business.

tion about what specified phase or phases of the acts had been violated through unlawful possession or use of the seized material, or otherwise (R. 56-58). Mr. Zweiner continued to describe his information sources only as "credible persons" who "described" the literature for which the search was made as being "communistic literature, which follows the communist line and is designed to forward the aims and purposes of the Communist Party" (R. 58).

Mr. Zweiner also said "I would like to state further that the laws of the State of Texas makes being a member of the Communist Party a crime; whether or not this is constitutional is probably another question. . . ." (R. 41). He admitted that no physical objects capable of overthrowing the United States were taken from petitioner's home, "not . . . unless you consider throwing hard-back books at people, like a weapon" (R. 58).

The hearing also established that Mr. V. Murray Jordan, the other affiant, and the officer who supervised the selection of the materials taken pursuant to the warrant (R. 55, 56), selected only "pro-Communist" literature. Mr. Jordan was a 1959 graduate of the University of Texas Law School. He had been a finance major as an undergraduate. He had not studied communism either in college or law school (R. 59-60). He had simply looked at "various samples of . . . communist party literature . . ." (R. 61).

Mr. Jordan's unidentified informants told him they had received "communist party literature" from petitioner at a Communist Party meeting (R. 61-62), and that the distributed "material" would be the subject of discussion led by petitioner, "that discussion about an article from these pamphlets and this was stated to be the communist party line or leaf [sic] of the communist party line" (R. 63). Mr. Jordan (R. 63-64), and Mr. Zweiner (R. 55-56) believed the

warrant ordered only the seizure of books which were sympathetic to the Communist Party "line".

On January 20, 1964, the court below denied petitioner's application for the return of his books and papers (R. 8-9). On January 29, 1964 petitioner moved to set aside the judgment and to obtain a new trial, setting forth all the grounds which had been previously asserted as foundation for nullifying the warrant and ordering the return of the materials taken under it, and alleging the judgment was contrary to the law and the evidence (R. 10-16). On the same date the court overruled the motion (R. 15).

Summary of Argument

I.

The warrant under which petitioner's books, papers and correspondence were seized was constitutionally defective in three respects: (a) The magistrate who issued the warrant was supplied with no "facts or circumstances" upon which to base a decision whether probable cause existed. *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Jones* v. *U. S.*, 362 U. S. 257 (1960); *Nathanson* v. *U. S.*, 290 U. S. 41 (1933). (b) The warrant recited only that it was issued to search for violations of "Article 6889-3 and Article 6889-3A, Revised Civil Statutes, State of Texas," which contain a wide variety of forbidden acts. The specific crime for which the warrant issued was not specified. *U. S.* v. *Simmons*, 96 U. S. 360 (1877); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Ex Parte Burford*, 3 Cranch 448 (1806); *Henry* v. *U. S.*, 361 U. S. 98 (1959). (c) The warrant failed to "particularly describe . . . the . . . things to be seized." In effect, the officers wielded a general search warrant. *Marron* v. *U. S.*, 275 U. S. 192 (1927), *Marcus* v. *Property Search Warrant*, 367 U. S. 717 (1961).

II.

The procedure authorized by Section Nine of the Suppression Law afforded petitioner less protection than is required for suppression of allegedly obscene books. *Marcus* v. *Property Search Warrant*, 367 U. S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). Since Texas sought to suppress petitioner's books because of their political content, no amount of procedural due process would validate its invasion of petitioner's privacy and liberty.

In addition, Section Nine authorizes the seizure of evidence, thereby violating the Fourth and Fifth Amendments. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Gouled* v. *United States*, 255 U. S. 298 (1921); *United States* v. *Lefkowitz*, 285 U. S. 452 (1932). Under no theory can petitioner's books and papers be treated as instrumentalities of crime or contraband.

III.

The Control Law and Suppression Law are superseded by federal legislation. The preemption test in *Nelson* v. *Pennsylvania*, 350 U. S. 497 (1956)—pervasiveness of federal legislation, dominant federal interest, and conflict with federal laws—is satisfied by virtue of the scope of the Texas statutes and their clear purpose to regulate the Communist Party and its activities.

Congress has adopted exhaustive legislation intended to regulate the same activities as do the Texas statutes. The activities of the Communist Party bear principally upon international affairs, foreign affairs, and the common defense—all matters which affect the areas solely entrusted to the federal government. Regulation of the Communist Party requires a uniform policy which can be achieved only if the federal government has sole responsibility over its activities.

ARGUMENT

I.

The seizure of petitioner's books, papers, and private correspondence violated the Fourth and Fourteenth Amendments.

a. The Warrant Issued Without Probable Cause

The search warrant in this case was issued without probable cause in violation of the Fourth Amendment, which applies to the States through the Fourteenth. *Mapp* v. *Ohio*, 367 U. S. 643 (1961), *Ker* v. *California*, 374 U. S. 23 (1963).

> "Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Nathanson* v. *U. S.*, 290 U. S. 41, 47 (1933).

> "Probable cause exists if the facts and circumstances . . . warrant a prudent man in believing that the offense has been committed." *Henry* v. *U. S.*, 361 U. S. 98, 102 (1959).

Any doubt about the failure of the warrant in question to meet the constitutional requirement that it issue only upon probable cause, was extinguished by this Court in *Aguilar* v. *Texas*, 378 U. S. 108 (1964). That case struck down as insufficient an affidavit in support of an application for a search warrant which stated:

> "Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics and narcotic paraphernalia are being

> kept at the above described premises for the purposes of sale and use contrary to the provisions of the law." At 109.

The application in the present case is strikingly similar. After stating that "he has good reason to believe and does believe" petitioner's home was a place where written instruments concerning the Communist Party were unlawfully possessed and used, the applicant said:

> "That this officer received information from two credible persons that the party named above has such books and records in his possession which are books and records of the Communist Party . . . That such information . . . has been confirmed by recent mailings . . . of pro-Communist material" (R. 71).

A joint affidavit of the "two credible persons," both Assistant Attorneys General of Texas, was attached to the application. Other than identifying the affiants, the affidavit does little more than state a belief, in language nearly identical to that used by the applicant, that petitioner's home was a place where writings concerning the Communist Party were unlawfully possessed, and asserts "information" about a mailing of material "identified as pro-Communist", and "other information received in the course of investigation that Stanford has in his possession the books and records of the Texas Communist Party" (R. 70).

The affiants did not allege personal knowledge of the mailing, let alone the nature of the material mailed; nor did they allege personal knowledge of facts to support the "information" that petitioner possessed books and records of the Texas Communist Party.

If one untangles these words, the affidavit, in attempting to present facts and circumstances, says that the affiants have been told by completely unidentified sources of un-

established reliability that petitioner, two weeks before the issuance of the warrant, had mailed materials which these sources "identified as pro-Communist." The second "fact or circumstance," somewhat more clearly perhaps, shows that sources of equally unestablished reliability told the affiants that petitioner had in his possession books and records of the Texas Communist Party. Both of the statements are hearsay.

In *Aguilar*, 378 U. S. at 114-115, the Court said:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that [the crime had been committed], and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed (see Rugendorf v. United States, 376 U. S. 528), was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate', as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime' Giordenello v. United States [357 U. S. 480], 486; Johnson v. United States [333 U. S. 10], 14, or as in this case by an unidentified informant."

Again, as the Court said in *Jones* v. *U. S.*, 362 U. S. 257, 269 (1960), while probable cause can be established by hearsay evidence, the magistrate must be shown a "substantial basis for crediting the hearsay . . . presented."

It must be remembered in the present case that the two "credible" persons referred to in the application did not

themselves have personal knowledge of the "facts" upon which they based their beliefs. Even at the hearing below they testified only that they had been informed by unidentified sources of the "facts" upon which they based their beliefs (R. 58, 61). And as in *Aguilar*, the affidavit "not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.'" 378 U. S. at 113.

The "facts and circumstances" upon which this warrant issued are to this day known only to the persons who gave the "credible" affiants "information" of mailings of "pro-Communist material" and the possession of records of the Communist Party of Texas. The magistrate who issued the warrant in this case had absolutely no "facts and circumstances" presented to him under oath or affirmation, *Nathanson* v. *U. S.*, *supra*, at 44, 47 (1933), which would "warrant a prudent man in believing that the offense has been committed." *Henry* v. *United States*, *supra*, at 102.

In *Aguilar* there was at least some small basis for personal knowledge of the affiants—though it was not before the magistrate until a hearing was had upon the return of the warrant. Then it was discovered that the affiants' beliefs rested partially on a week's surveillance of the defendant. No such personal knowledge about the conduct of the petitioner was ever disclosed to the magistrate in this case.

The issuance of a search warrant cannot be based on such frivolous grounds. The basic reason for obtaining a warrant is

> "so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether

liberty or privacy is to be invaded." *Jones* v. *U. S.*, 362 U. S. 257, 270-271 (1960).

The Constitutional requirement that a judicial officer be presented with "facts and information" to allow him to decide independently whether a warrant should issue cannot be satisfied by the pretense of supplying him with an affidavit which contains only twice-told rumors.

b. *The Application and Search Warrant Failed to Specify the Crime Charged*

The Suppression Law makes all of the following illegal: commission of an act intended to overthrow [etc.] the United States or Texas; advocacy or teaching such doctrine; conspiracy to commit such acts or teach such doctrines; support of any organization which engages in or advocates such acts. Thus, a warrant might issue under Section 9 for the seizure of material "showing" the commission of any of these crimes. But they are each quite separate, and the application and warrant must indicate the offense which has probably been committed. Section 9 itself contains this requirement. Nonetheless, the application and warrant were devoid not only of any notice of the particular provision of the Suppression Law supposedly violated, but compounded the defect by authorizing the search and seizure of evidence bearing on the cluster of crimes contained in the Control Law as well (R. 71-73).

The requirement of specificity permeates every phase of the criminal process. For example, an indictment must state the particular charge and the specific facts which amount to a violation of that charge. *U. S.* v. *Simmons*, 96 U. S. 360 (1877); *U. S.* v. *Hess*, 124 U. S. 483 (1888); *Smith* v. *O'Grady*, 312 U. S. 329 (1941). Similarly, State statutes which are so vague and indefinite in the description of the

conduct which they prohibit violate the Due Process Clause of the Fourteenth Amendment. See e.g., *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Winters* v. *New York*, 333 U. S. 507 (1948); *U. S.* v. *Cardiff*, 344 U. S. 174 (1952); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Baggett* v. *Bullitt*, 377 U. S. 360 (1961).

The case law dealing with the Fourth Amendment itself sets forth the same requirement of specificity. As early as 1806, in *Ex Parte Burford*, 3 Cranch 448, this Court held unconstitutional the imprisonment of a person pursuant to a warrant of commitment which used the following general language to describe the prisoner's "offense":

> "... John A. Burford ... is not of good name and fame, nor of honest conversation, but an evil doer and disturber ... the peace of the United States, so that murder, homicide, strifes, discords, and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby ..." At 450-451.

The warrant was held illegal because it failed to state "*some good cause certain, supported by oath*" for its issuance. *Id.* at 453.

The requirement that the application for a search warrant specifically recite the crime probably committed has been implicit in many of this Court's decisions involving questions of probable cause, where it has been quite uniformly said that that requirement is to assure the likelihood that "*the* offense has been committed." *Carroll* v. *U. S.*, 267 U. S. 132, 161 (1925); *Dumbra* v. *U. S.*, 268 U. S. 435, 439 (1925); *Henry* v. *U. S.*, 361 U. S. 98, 102 (1959).

Also instructive is Lord Camden's opinion in *Entick* v. *Carrington and three other Kings Messengers*, 19 Howell's

State Trials 1029 (1765), the landmark decision of Anglo-American jurisprudence relating to searches and seizures. This Court, which has described *Entick* as a "monument to English liberty," said that its propositions "were in the minds of those who framed the Fourth Amendment to the Constitution . . ." *Boyd* v. *United States*, 116 U. S. 616, 626-627 (1886). In developing the history of the search warrant, Lord Camden said:

> "The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than law by imperceptible practice . . . No less a person than my Lord Coke (4 Inst. 176) denied its legality: and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case.—*There must be a full charge upon oath of a theft committed. . . .*" (Emphasis added.) At 1067.

Thus, there has been a requirement of a "full charge," or a "good cause certain," before a search warrant may issue for at least two hundred years. This is not to suggest that all technical requirements of a pleading are required, but before one is subjected to an invasion of privacy and liberty he is entitled to be specifically informed of the crime to which the search is related.

The requirement that the application and search warrant specify a particular crime is important for several reasons. First, a particularized description of the things seized cannot have its intended cautionary effect unless the description is capable of being tested by reference to a crime. For example, a specification that the crime probably

committed is embezzlement suggests there is no need for the warrant to authorize a search for guns and ammunition. In short, specificity of the crime and description of the items to be seized test each other, and together insure no improper impairment of individual liberty.

Second, notification of the specific crime charged affords one whose privacy and liberty are at stake the opportunity to confer intelligently with an attorney in order to challenge the seizure or present a defense in the event of subsequent criminal proceedings. And as indicated by counsel in *Burford*, who cited Blackstone for this point, it is proper to require that a specific charge be reflected in the warrant to provide a record for review of the proceedings by an appellate court. 3 Cranch at 452-453.

c. *The Warrant Failed to Particularly Describe the Things to Be Seized*

The Fourth Amendment provides that warrants shall "particularly describ[e] . . . the . . . things to be seized." Elaborating on that requirement in *Marron* v. *United States*, 275 U. S. 192, 196 (1927), this Court said:

> "[This] requirement . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The warrant in the present case manifestly fails to particularly describe the things to be seized. Because it ordered seizure of "books, [etc.] concerning the Communist Party of Texas, and the operations of the Communist Party in Texas [which] are unlawfully possessed and used in violation of [the Control Law and the Suppression Law]," the officers were vested with unfettered discretion in its execution. Consequently, laying siege to petitioner's house for

five hours, they rummaged freely through his books, records and private correspondence, and seized any publications they capriciously deemed pro-Communist, including private papers and privileged correspondence with his attorneys.

The affiants here wielded in effect a general search warrant which invested them with carte blanche to seize whatever took their fancy. But as Mr. Justice Brennan pointed out in *Marcus* v. *Property Search Warrant*, 367 U. S. 717, 729:

> "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."

In *Entick* v. *Carrington*, *supra* at 1067, Lord Camden pointed out, regarding the execution of a search warrant, "The owner [of stolen goods] . . . must attend at the execution of the warrant, to shew them to the officer, who must see that they answer the description." This necessarily means they must be particularly described. It is dispiriting, therefore, that the law of England in 1765 required more of a search warrant than was afforded this petitioner. Rights recognized when the ducking stool and the whip were used should provide at least a minimum standard for Texas two hundred years later.

II.

Section Nine of the Suppression Law is unconstitutional.

a. Section Nine, on Its Face and as Applied in This Case, Violates the First and Fourteenth Amendments

Petitioner is frank to say that he cannot conceive of any circumstances or any procedure, no matter how elaborate, which would justify the seizure of his books and papers by State officials on the ground that they were pro-Communist, or pro- or anti- anything else. That is what the First Amendment and our free society are all about.[3]

Obscene publications are the only class of publications which can constitutionally be subjected to state suppression. *Roth* v. *U. S.*, 354 U. S. 476 (1957). The seizure of publications because of their political content has generally been condemned in Anglo-American society since the Eighteenth Century. See *Marcus* v. *Property Search Warrant*, 367 U. S. 717, 724-729 (1961).

This Court has condemned as inadequate procedures affording the owner of "obscene" books more protection than petitioner was given. *Marcus* v. *Property Search Warrant*,

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[3] See *Abrams* v. *United States*, 250 U. S. 616 (1919) (dissenting opinion); *Whitney* v. *California*, 274 U. S. 357 (1927) (concurring opinion); *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *CIO*, 307 U. S. 496 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *West Va. Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Talley* v. *California*, 362 U. S. 60 (1960); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); *Cramp* v. *Bd. of Public Instruction*, 368 U. S. 278 (1961); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963).

supra; A Quantity of Books v. *Kansas*, 378 U. S. 205 (1964). *Marcus* declared that if publications were to be seized as obscene, the State, because of the nexus between books and the exercise of free expression, must provide a method having greater safeguards for individual liberty than are required to seize gambling paraphernalia or other contraband. 367 U. S. at 730-731. *A Quantity of Books*, 378 U. S. at 212.

The procedure struck down in *Marcus* required an adversary hearing within twenty days after seizure under warrant, to determine whether the books were obscene. The Kansas procedure was similar. The holding in both cases was that seizure of allegedly obscene books *before* an adversary hearing was unconstitutional. What then can one say about the seizure on an ex parte warrant, of petitioner's books (both his own and his stock-in-trade) on the ground they were pro-Communist. We do not suggest that a hearing prior to seizure would have cured the defects in this case; we have already denied any power in the state to interfere with petitioner's possession or sale of the books in any way.[4] The mere thought of what such a hearing would consist of compels its immediate rejection—at least at this time in this nation.

But what Texas has done in this case is more shocking than the trial for political conformity posed and rejected above; for Texas has in effect declared petitioner guilty of heresy without any trial whatever. In a secret proceeding, on facts undisclosed even to the court, the State has found that petitioner possessed "pro-Communist" material and assigned State officials to invade his home to remove and suppress the heretical literature.

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[4] Except, of course, by way of any commercial liabilities he might incur.

Any statute which authorizes that kind of practice cannot exist side by side with the Constitution. If Section 9 is not struck down smartly, then it will be the Constitution which will have fallen.

b. Section Nine, on Its Face and as Applied in This Case, Violates the Fourth, Fifth and Fourteenth Amendments

The seizure of petitioner's books and papers was made under a warrant issued pursuant to Section 9 of the Suppression Law, which provides for the seizure of "books [etc.] *showing* that a person or organization is violating or has violated any of the provisions of this Act." (Emphasis added.) The provision is unconstitutional on its face, for its authorizes issuance of a warrant for a purpose prohibited by the Fourth and Fifth Amendments, which apply to the State through the Fourteenth. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

> "[P]rivate papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them." *Abel* v. *United States*, 362 U. S. 217, 234-235 (1960).

This Court has not previously considered a statute so bold in its pronouncement of contempt for the liberties secured by the Fourth and Fifth Amendments. In *Boyd* v. *United States*, 116 U. S. 616 (1886), a less offensive statute than the present one in Texas was condemned because its effect was "tantamount to compelling" the production of books and papers which under the statute might be examined and used as evidence by the United States. Equating this to a seizure by warrant, this Court found the Statute violated both the Fourth and Fifth Amendments. "[W]e have been unable to perceive that the seizure of a man's

private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." At 633.

Later cases have sought to distinguish between papers which were "instrumentalities" of a crime and those which were merely evidence of a crime. Contracts and bills "of no pecuniary value, but of evidential value" have been held protected from seizure, *Gouled* v. *United States*, 255 U. S. 298 (1921); bills and ledgers of one who had unlawfully manufactured whiskey during Prohibition were so closely related to the conduct of unlawful business that they were deemed used to carry on the criminal conduct and so were not protected, *Marron* v. *United States*, 275 U. S. 192 (1927); books of account and other papers including private records, even though "intended to be used to solicit orders for liquor in violation of the [Prohibition] Act . . . were in themselves unoffending" and protected against seizure, *United States* v. *Lefkowitz*, 285 U. S. 452, 465 (1932); draft cards not the defendant's own were instrumentalities so were not protected. *Harris* v. *United States*, 331 U. S. 145 (1947).

Never have materials of the kind taken in the present case been deemed to be instrumentalities of crime. While state officials may long for the power to seize books that have not lost the protection of the First Amendment, the Constitution forbids it; for if their possession is not unlawful, that is, if they are neither contraband nor the fruits or implements of crime, they cannot be more than evidence of crime. Though there are nations where possession or sale of publications unpalatable to the government is deemed criminal, the United States is not one of them.

III.

Articles 6889-3 and 6889-3A have been superseded by Federal legislation.

The search warrant in question here was issued under Section 9 of Article 6889-3A on the ground that petitioner possessed and used material in violation of Article 6889-3 (Control Law) and Article 6889-3A (Suppression Law) (R. 72-73). These statutes, which attempt to regulate the Communist Party of the United States and its local affiliates, and their activities, have been superseded by federal law and are therefore void.

The Control Law provides, in brief, for the compulsory registration of "Communists" and members of "Communist Front Organizations", as both are defined in the statute (Secs. 1 and 3), who remain within the state for five consecutive days (Sec. 4A). The "Communist Party" itself, and any "Communist Front Organization," must also register if they have any members within the state (Sec. 4C). Failure to register is a felony which may be punished by a fine of from $1,000 to $10,000, and by imprisonment for not less than two or more than ten years (Sec. 4D). The Law also makes it a crime to sabotage or destroy any property "used in connection with national defense" (Sec. 5). The names of "Communists" or nominees of the "Communist Party" may not be printed upon any election ballot (Sec. 6), nor may a "Communist" or a knowing member of a "Communist Front Organization" hold any nonelective office for the state or any of its subdivisions (Sec. 7).

The Suppression Law provides that the Communist Party and all its related organizations are illegal, as are any organizations which "advocate, abet, advise, or teach . . . any activities intended to overthrow, destroy, or alter, or

to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Texas, or of any political subdivision of either of them, by force or violence" (Sec. 2); any such organization found within the state forfeits all its property to the state (Sec. 2). The Law also prohibits several varieties of the crime known as sedition against the United States and Texas (Sec. 5). Section 9, very much in issue in this case, provides for the issuance of search warrants for the purpose of "showing" a violation of the Suppression Law.

The similarity of the Texas statutes to the federal statutes in the same area is perfectly obvious. They are virtual copies, though something less than skillfully drawn copies. The Control Law, adopted in 1951, is fashioned after the Subversive Activities Control Act of 1950 (50 U. S. C. §781 *et seq.*). The Suppression Law, adopted in 1954, closely follows The Communist Control Act of 1954 (50 U. S. C. §841 *et seq.*) and the Smith Act of 1940 (18 U. S. C. §2385).

The decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956), leaves no doubt that seditious activity directed against the Federal government is the exclusive province of the United States. State statutes which purport to regulate such activities are unenforceable. There is no longer any dispute about this proposition.

The statute involved in the *Nelson* case was the Pennsylvania Sedition Act. Pa. Penal Code §207, 18 Purdon's Pa. Stat. Ann. §4207. This statute prohibited seditious activities against the United States and the State of Pennsylvania. Nelson was convicted under that statute for sedition against the United States. This Court, affirming the decision of the Pennsylvania Supreme Court which reversed the conviction, found that the federal legislation was so pervasive that it had occupied the field to the exclusion of

parallel state legislation, that the dominant interest of the Federal government precluded state intervention, and that administration of state statutes would conflict with the operation of the federal plan. 350 U. S. at 509. Thus, the portions of the Control Law and Suppression Law which proscribe sedition against the United States by the Communist Party or anyone else (Suppression Law, §§2 and 5) are superseded and therefore invalid and unenforceable.

But *Nelson* teaches us more than was held on its exact facts. Its general proposition states that the test of supersession is contained in a threefold formula: (1) whether the scheme of federal regulation is so pervasive that it can reasonably be inferred that Congress left no room for the states to legislate, 350 U. S. at 502; (2) whether the state statutes concern a field in which the federal interest is so dominant that the federal system must be presumed to preclude enforcement of state laws on the same subject, 350 U. S. at 504; (3) whether enforcement of the state laws presents a serious danger of conflict with the administration of the federal program, 350 U. S. at 505.

Furthermore, any doubt about the scope of *Nelson* is set to rest in this particular case where it is the Communist Party and its activities which are the specific subject of the Texas laws. Given the panoply of federal legislation directed explicitly against the Communist Party, the supersession of parallel state legislation cannot be gainsaid.[5] And the record in this case shows that it is petitioner's alleged affiliation specifically with the Communist Party and its activities which are at issue. This

[5] Which is not to say that all state legislation which regulates the Communist Party is invalid. Cf. *Adler* v. *Board of Education*, 342 U. S. 485 (1952); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Board of Education*, 357 U. S. 399 (1958), all of which involve state employees, not private citizens.

is clear from the search warrant (R. 72-73), the application for the warrant (R. 71-72), and the affidavit in support of the application (R. 70).

1. The Pervasiveness of Congressional Legislation

Congress has enacted exhaustive legislation involving comprehensive and detailed regulation of the Communist Party, and its activities. In addition to the Smith Act, *supra,* the Subversive Activities Control Act, *supra,* and the Communist Control Act, *supra,* Congress has also sought to regulate Communist Party activity by the following legislation: Immigration and Nationality Act, 8 U. S. C. §§1182, 1251, 1327, 1424, 1451; National Defense Education Act of 1958, 20 U. S. C. §581; Internal Revenue Code, 26 U. S. C. §3121; Postal Service, 39 U. S. C. §4008; Social Security Act, 42 U. S. C. §410; Temporary Unemployment Compensation Act of 1958, 42 U. S. C. §1400i; National Science Foundation Act of 1950, 42 U. S. C. §1874. So pervasive is this legislation that there is literally no room left to the states to enact parallel legislation. *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Pennsylvania* v. *Nelson, supra,* at 502. Both the simple numerical quantity of statutes which have been adopted by the Congress, and the breadth of their application over the most diverse fields of interest, easily support the conclusion that this element of the tripartite *Nelson* criteria is satisfied.

2. The Dominant Federal Interest

Since the *Nelson* decision, distinctions have been drawn between "subversive" activities directed at the United States and those directed solely at the individual states, and it has been argued that state regulation of subversive activities directed against themselves is not superseded by

Federal statutes. This theory, if it has any vitality at all,[6] collapses when applied to the activities of the Communist Party. The activities of the Communist Party are directed primarily against the Federal government and involve political issues which are the predominant concern of the United States. Congress has made this clear time and again.

In enacting the Internal Security Act of 1950 Congress found that the Communist movement was a worldwide revolutionary movement (50 U. S. C. §781(1)); that the direction and control of the world Communist movement was vested in and exercised by the Communist dictatorship of a foreign country (50 U. S. C. §781(4); that Communist action organizations (as defined in the Act) are in fact consistent elements of the worldwide Communist movement (50 U. S. C. §781(6)); that individuals who knowingly and wilfully participated in the world Communist movement in effect had repudiated their allegiance to the United State and had transferred their allegiance to the foreign country which directed and controlled the world Communist movement (50 U. S. C. §781(9)); that the Communist network in the United States was inspired and controlled largely by foreign agents who come into this country ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions and in similar capacities (50 U. S. C. §781(12)); and that numerous aliens were in the subversive classes in this

[6] The overthrow of a State government by an organization such as the Communist Party would necessarily involve the taking over of railway lines, interstate highways, airports, telephone exchanges, broadcasting stations, post offices, port facilities where they existed and would involve the suspension of Federal laws and of the protection of United States citizens. In the instant case, the overthrow of Texas would also involve control over part of the United States border with a foreign nation and over United States military bases.

country (50 U. S. C. §781(13)). The term "Communist-action organization" was defined as being substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement (50 U. S. C. §782(3)).

In enacting the Communist Control Act of 1954, Congress found that the Communist Party acted as an instrumentality of a hostile foreign power (50 U. S. C. §841), and that the term "Communist Party" meant the Communist Party of the United States, the Communist Party of any state, and any unit or subdivision of any such organization (50 U. S. C. §843).

These Congressional findings acknowledge that the regulation and control of the Communist Party of the United States and its affiliates in the individual states are intimately associated with international affairs, foreign policy, and the common defense, areas within the exclusive domain of the Federal government.[7] Activities of the Communist Party do not become subject to state regulation merely by artificially characterizing them as being directed against the individual states.[8]

The state courts have recognized this dominant federal interest. For example, in *Commonwealth* v. *Gilbert*, 334

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[7] The Control Law acknowledges the same fact. Section 2 defines the Communist Party as "any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which in any manner advocates, or acts to further, the world Communist movement." Further, the preamble to this Law states that "there exists a world Communist movement, directed by the Union of Soviet Socialist Republics and its satellites, which has as its declared objective world control." See also Section 1 of the Suppression Act.

[8] At the hearing below, the State's Attorney revealed the artificial character of the state's position by interjecting, "It is a crime to advocate the overthrow of the United States . . ." (R. 41).

Mass. 71, 134 N. E. 2d 13 (1956), the defendant was indicted for conspiring to overthrow the government of Massachusetts. In quashing the indictment, the court, through Chief Justice Qua, speaking to the elements of the crime alleged in the indictment and bill of particulars, said:

"These include membership in the Communist Party, advocacy of the principles of Marxism-Leninism and of violent overthrow of the government of the Commonwealth, the holding of 'cell meetings' and 'secret procell' meetings to study and promulgate Communist literature and the methods to be used for the victory of Communism, including the idea that the working class must shatter the State machinery, that the party seize control, destroy parliamentary government, and establish the dictatorship of the proletariat, and to learn the technique and methods for violent revolution. It is alleged that at such meetings a coconspirator would advocate that the workers of the United States must be armed to carry out an armed revolt in the United States, that the government should be overthrown by force to establish the dictatorship of the proletariat and that the defendant was to assist in raising money to further the objects of the Communist Party. Although all these things and more in the same line are specified as pertaining to the conspiracy to overthrow the government of this Commonwealth, it is evident that they are the familiar paraphernalia of Communist agitation for the overthrow of government in general, and cannot be directed separately and exclusively against the government of this Commonwealth. They fall within the purview of the Smith Act which by its terms is directed against propaganda for the overthrow not only of the government of the United States, but of the governments of the States as well. If the field in which was set the indictment in

Commonwealth of Pennsylvania v. *Nelson* has been exclusively occupied by the Federal government, it seems an inescapable deduction that the present indictment also invades the exclusive Federal field." 134 N. E. 2d, at 15-16.[9]

Furthermore, the Texas statutes themselves contain evidence that they were designed to trespass in areas for which the United States has sole responsibility. The preamble to the Control Law states:

"Since the State of Texas is the location of many of the Nation's largest and most vital military establishments, and since it is a producer of many of the most essential products for national defense, the State of Texas is a most probable target for those who seek by force and violence to overthrow Constitutional Government, and is in immjnent danger of communist espionage and sabotage."

It is only realistic to recognize that, so long as the fortunes of the Communist Party are closely tied to a foreign nation which is antagonistic to the United States, the undivided national interest requires the central government to have the paramount authority in determining the posture to be taken towards the Party.

Thomas Jefferson capsulated this idea of the centrality of power where it is the national interest which is at stake:

"My own general idea was, that the States should severally preserve their sovereignty in whatever concerns

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[9] Accord: *Braden* v. *Commonwealth*, 291 S. W. 2d 843 (Ky. 1956); *Commonwealth* v. *Dolsen*, 183 Pa. Sup. 339; *Albertson* v. *Millard*, 345 Mich. 519; *State* v. *Jenkins*, 236 La. 300, 107 So. 2d 648 (1958); *State* v. *Levitt et al.*, Monroe (Ind.) Circuit Court, Nos. 629, 630 (New York Times, March 21, 1964).

themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty." Memoir, Papers of Thomas Jefferson (1829), vol. 2, p. 230, letter to Mr. Wythe.

3. The Need for a Uniform National System of Regulation

Matters which by their nature are national, or admit only of one uniform system of regulation, require the exclusive legislation of Congress. *Cooley* v. *Board of Wardens*, 53 U. S. (12 How.) 299 (1851); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). Control of the Communist Party and its affiliates is an area which requires such uniform policies, standards and procedures. See *Pennsylvania* v. *Nelson*, 350 U. S. 497, 505-09 (1956).

In *Nelson*, the Court set out at length the danger of conflict between the state statute involved there and its federal counterpart, the Smith Act. The explication is formidable and we will not presume to improve upon it; we only rely upon it. We do, however, add this observation. All that was involved in *Nelson* was one state statute which undertook to prohibit the crime commonly called sedition, but that was enough to support the Court's conclusion that it provided ample danger of conflict with federal enforcement of the Smith Act. But in this case a far more elaborate web of legislation is involved and the danger of conflict described in *Nelson* is augmented many times over by virtue of the spidery patterns indiscriminately drawn by the sweeping statutes in this case.

One example of potential conflict which is particularly relevant in this case is the decision whether it is preferable to allow the American Communist Party and its affiliates, well infiltrated by government agents, to operate with a relative degree of freedom or to undertake a vigorous pro-

gram of suppression which will inevitably drive Party workers underground. This issue should be resolved by a central policy-making body on a national level.

Moreover, this case provides a nice conflict between the complete absence of explicit procedural safeguards under the Texas statutes and the elaborate procedures provided by Congress to insure a fair degree of procedural due process within a statute whose constitutionality is hotly disputed.[10]

Lack of uniformity in the instant case results in still other inconsistencies and conflicts which blunt the aims of Congress. Section 3 of the Texas Suppression Law provides only that registration under the Texas Communist Control Law shall not be admissible in any Suppression Law proceeding but does not exclude evidence of registration under Federal statutes, although Congress did not intend that the fact of registration be used in any criminal prosecution. 50 U. S. C. §783(f).

Section 6 of the Suppression Law provides that no person convicted of any violation of that Law shall ever be entitled to suspension or probation of sentence, a particularly vindictive feature absent from any of the relevant federal legislation. The Texas statutes thus go beyond the Federal statutes and impose harsher penalties than Congress desired.

"When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and

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[10] See *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961). Compare *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, No. 65, October Term, 1964; *American Committee for Protection of the Foreign Born* v. *Subversive Activities Control Board*, No. 44, October Term, 1964; *Communist Party* v. *United States*, 331 F. 2d 807 (CADC, 1963), cert. den. 377 U. S. 968.

a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604 (1915). See *Hines* v. *Davidowitz, supra,* at 66-67; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265 (1929).

Another consequence of the competing legislation is the prospect that individuals will be subject to prosecution in different jurisdictions for the same conduct,[11] and subject, therefore, to litigation involving varying procedural and evidentiary rules and standards of proof, as is the petitioner here in fact. Even if uniform statutory language in the various state acts be assumed, state courts will apply varying interpretations to the provisions of their own Communist control statutes. As this Court stated in another context, "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union*, 346 U. S. 485, 490-491 (1953). This Court stated in *Nelson*: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment." *Pennsylvania* v. *Nelson, supra,* at 509-10.

Respondent will, of course, in meeting this supersession argument, rely on *Uphaus* v. *Wyman*, 360 U. S. 72 (1959), as it did in its Response to the petition for a writ of certiorari, p. 16: "We believe that the intent of the Nelson case is explained in the Uphaus case, and that this intent is not to arbitrarily strike down all of the statutes of the various states involving subversion."

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[11] *Bartkus* v. *Illinois*, 359 U. S. 121 (1959); *Abbate* v. *United States*, 359 U. S. 187 (1959).

It would be too ingenuous to deny that *Uphaus* and *Nelson* are in considerable conflict. There are, of course, distinctions to be drawn between the two cases. For example, *Uphaus* involved only investigation of so-called subversive activity within New Hampshire, not a prosecution as in *Nelson*. *Uphaus* involved only "the right of the State to require the production of corporate papers of a state-chartered corporation in an inquiry to determine whether corporate activity is violative of state policy" (360 U. S. at 77), a question not present in *Nelson*. However, we believe that the Court must directly confront the statement in *Uphaus* that "the opinion [in *Nelson*] made clear that a State could proceed with prosecutions for sedition against the State itself . . ." 360 U. S. at 76.

Nelson, however, said nothing of the kind. It merely emphasized that it was exercising its responsibility to decide the case only on its particular facts. Nonetheless, *Uphaus* proceeded on this mistaken interpretation of *Nelson* and justified the New Hampshire investigation, at least in part, on the ground that the state was not pre-empted from the field. Consequently, the two decisions can be interpreted to leave undecided the supersession question raised in the case at bar.

We have set out the reasons for finding that the Texas statutes have been superseded. If, however, it is the opinion of the Court that *Uphaus* bars that conclusion, then we respectfully urge that it be reconsidered and overruled.[12]

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[12] *Uphaus* should be overturned as well for the independent reason that it is inconsistent with prior and subsequent decisions of this Court in the area of First Amendment freedoms, including *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Talley* v. *California*, 362 U. S. 60 (1960); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964). See Brief of the American Civil Liberties Union, *amicus curiae*, in *Dombrowski et al.* v. *Pfister et al.*, No. 52, Oct. Term, 1964.

In conclusion, a word can properly be said here about the inevitable claim of "States' rights" that will be raised in opposition to the application of the Supremacy Clause in this case. Just as there are limitations upon the powers of the federal government with regard to the states, so are there limitations upon the scope of the powers of the states. The Tenth Amendment cuts both ways, for it reserves to the states only "the powers not delegated to the United States by the Constitution. . . ." The powers involved in this case include several that are expressly delegated by the Constitution to the United States. They include its responsibility over foreign affairs (Art. I, Sec. 8; Art. II, Sec. 2),[13] the common defense (Art. I, Sec. 8, Clause 1), and the guarantee to every state of a republican form of government (Art. IV, Sec. 4). For the states to infringe on these powers is to cut away the foundation of our federal system.[14]

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[13] See for example, *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880); *Missouri* v. *Holland*, 252 U. S. 416 (1920); *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

[14] Since the decision in *Nelson*, Congress has declined to reverse the effect of this Court's ruling in that case, although numerous bills for such purpose have been considered in both Houses. This reinforces the view that Congress intended to preempt this area.

H. R. 3, 85th Cong., 2d Sess. (1958), which provided that Federal sedition legislation did not supersede state sedition statutes, was passed by the House on July 17, 1958. 104 Cong. Rec. 14162 (1958). The Senate did not act on this bill.

S. 654, 85th Cong., 2d Sess. (1958), the Senate version of H. R. 3, was intended by its supporters to expressly create in the states the right to enforce their sedition statutes against the Communist Party and others, and thus to nullify *Nelson*. S. Rep. No. 2250, 85th Cong., 2d Sess. 1 (1958). The bill was returned to committee late in the session, and not acted upon again. 104 Cong. Rec. 18928 (1958).

S. 2646, 85th Cong., 2d Sess. (1958), the Jenner-Butler bill, which would have had the same effect as S. 654, was tabled by the Senate on August 20, 1958. 104 Cong. Rec. 18686 (1958).

[*Footnote continued on page 35*]

CONCLUSION

Sam Houston, twice Governor of the Republic of Texas, in referring to the battle of San Jacinto, once wrote:

> "On that well fought field Texas Independence was won . . . But the sublimity of the spectacle is lost unless the eye has a scope for a wider field of vision."

First and last, the petitioner relies on the Constitution of the United States; but in the sense Sam Houston surely would have intended it, Texas has a heritage of its own which makes the seizure of library books in a man's home seem especially small.

As Americans, the residents of Texas share the glory of the American Revolution, but as Texans they know their people walked a second time down the bloody road of revolution—past Gonzales where the first shot was fired. Past the Goliad Massacre where James Fannin and 342 of his men, prisoners of war, were murdered. Past San Antonio

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[*Footnote continued from page 34*]

The Congressional debates upon these bills indicate that those Congressmen who had proposed them thought that the *Nelson* decision had precluded the states from prescribing penalties for seditious activities directed against either the Federal government or state governments by the Communist Party or anyone else. Their purpose was to overrule the Court's decision. 104 Cong. Rec. 18678, 18927 (1958) (remarks of Senator Eastland). The implication is clear that Congress, in declining to pass these bills, intended that the *Nelson* decision, as understood by its members, should stand unimpaired and that state legislation relating to activities by the Communist Party should not be revalidated. See *Provost* v. *United States*, 269 U. S. 443, 457-58 (1926); *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336 (1934); *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 500 (1936); *Missouri* v. *Ross*, 299 U. S. 72, 75 (1936); *Electric Storage Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14 (1939). In this instance, Congress not only remained silent after a judicial construction, but defeated proposed legislation whose specific purpose was to overturn that construction as understood by Congress.

where 27 year old Attorney at Law, Colonel William Barret Travis, Juan Abamillo, Jim Bowie, Englishmen, Scotsmen, Irishmen, men from 18 American states, and an immigrant from Denmark, Charles Zenco, first had a fandango to the tunes of former Congressman Davy Crockett's fiddle and big John McGregor's bagpipes, and then, along with a Negro remembered only as "John", entered the walls of the Alamo to make their stand and die. Finally, there was victory at San Jacinto where General Sam Houston, lawyer, protected the civil rights of the hated Santa Anna.

On March 2, 1836, at Washington on the Brazos River, the Republic of Texas gave the world a Declaration of Independence which magnificently demonstrated the right of a people, even unpopular people such as the Texans were, to express their views against the established government. And this they did for themselves and future generations of Texans in the face of Santa Anna's earlier decree, " . . . serán juzgados y castigados como piratas"—the Texans shall be judged and treated like pirates.

Today, the ultimate in the right of dissent by a person popular or unpopular, is written into the present Constitution of the State of Texas (1876) as contained in Section 2 of Article I of the Texas Bill of Rights. It is an echo of the Texas Revolution and it reads:

> "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of the republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform, or abolish their government *in such manner as they may think expedient.*" (Emphasis supplied.)

This business of playing havoc with a mail order bookstore in a citizen's private residence under a vaguely worded search warrant, based on an application and affidavit which did little more than spread a rumor, and where no specific violation or any crime was alleged, was as contrary to the ways of a civilized state as it was to the Constitution.

It was tyranny.

It was a monkey-see, monkey-do reminder of a dictatorship.

It was unworthy of the great State of Texas.

It cannot stand before the Constitution of the United States of America.

And it was an abandonment of the challenge in Ramsey Yelvington's moving play about the Alamo, *A Cloud of Witnesses*. In the final scene, the dead defenders walk out on the stage and tell the audience why they chose to die:

> "Only this we know. We died there and from our dust the mammoth thing Freedom received a forward thrust. The reverberations we continued are something to which Man may respond or not respond . . "

For these reasons the judgment of the court below should be reversed.

Respectfully submitted,

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October 1, 1964.

APPENDIX

ART. 6889-3. TEXAS COMMUNIST CONTROL LAW

Communist defined

Section 1. A "Communist" is a person who:

(A) Is a member of the Communist Party, notwithstanding the fact that he may not pay dues to, or hold a card in, said Party; or

(B) Knowingly contributes funds or any character of property to the Communist Party; or

(C) Commits or advocates the commission of any act reasonably calculated to further the overthrow of the Government of the United States of America, the Government of the State of Texas, or the government of any political subdivision of either of them, by force or violence; or

(D) Commits or advocates the commission of any act reasonably calculated to further the overthrow of the Government of the United States, the Government of the State of Texas, or the government of any political subdivision of either of them, by unlawful or unconstitutional means, and the substitution of a Communist government or a government intended to be substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites.

Definition of Communist Party

Sec. 2. The "Communist Party" is any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which

in any manner advocates, or acts to further, the world Communist movement.

Definition of Communist Front Organization

Sec. 3. A "Communist Front Organization" is any organization the members of which are not all Communists, but which is substantially directed, dominated or controlled by Communists or by the Communist Party, or which in any manner advocates, or acts to further, the world Communist movement.

Registration

Sec. 4. (A) Each person remaining in this State for as many as five (5) consecutive days after the effective date of this Statute, who is a Communist or is knowingly a member of a Communist Front Organization, shall register with the Department of Public Safety of the State of Texas on or before the fifth consecutive day that such person remains in this State, and so long as he remains in this State shall reregister annually with said Department between the first and fifteenth days of January.

(B) Such registration shall be under oath and shall set forth the name (including any assumed name used or in use), address, business occupation, purpose of presence in the State of Texas, sources of income, place of birth, places of former residence, and features of identification, including fingerprints, of the registrant; organizations of which registrant is a member; names of persons known by registrant to be Communists or members of any Communist Front Organization; and any other information requested by the Department of Public Safety which is relevant to the purposes of this Statute.

(C) Each and every officer of the Communist Party and each and every officer of Communist Front Organizations,

knowing said Organizations to be Communist Front Organizations, shall register or cause to be registered said Party or Organizations with the Department of Public Safety, if said Party or Organizations have any members who reside, permanently or for a period of time more than thirty (30) days, in the State of Texas. Such registration shall be under oath and shall include the name of the organization, the location of its principal office and of its offices and meeting places in the State of Texas; the names, real and assumed, of its officers; the names, real and assumed, of its members in the State of Texas and of any person who has attended its meetings in the State of Texas; a financial statement reflecting receipts and disbursements and by whom and to whom paid; and any other information requested by the Department of Public Safety which is relevant to the purposes of this Statute. Such registration shall be made within thirty (30) days after the effective date of this Statute, and thereafter at such intervals as are directed by the Department of Public Safety.

(D) Failure to register as herein required, or the making of any registration which contains any material false statement or omission, shall constitute a felony and shall be punishable by a fine of not less than One Thousand Dollars ($1,000) or more than Ten Thousand Dollars ($10,000), or by imprisonment of not less than two (2) or more than ten (10) years, or by both.

(E) Under order of any court of record, the registration records shall be open for inspection by any person in whose favor such order is granted; and the records shall at all times, without the need for a court order, be open for inspection by any law enforcement officer of this State, of the United States or of any State or Territory of the United States. At the discretion of the Department of Public Safety, such records may also be open for inspection by the general public or by any member thereof.

Sabotage

Sec. 5. It shall be a felony, punishable by a term in the penitentiary of not less than two (2) nor more than twenty (20) years for any person, with the intent to injure the United States, the State of Texas, or any facilities or property used for national defense, to sabotage or destroy, or to attempt to sabotage or destroy, any property, facility or service that is being used or is to be used in connection with national defense. Should any loss of life occur by reason of such sabotage or destruction, or by reason of any attempted sabotage or destruction of such character, the person committing or attempting to commit same shall be guilty of murder with malice aforethought and shall be punished by death, or by confinement in the penitentiary for life or for any term of years not less than two (2). The word "sabotage" as used herein means the wilful and malicious infliction of physical damage or injury to property. The penalty herein provided shall be cumulative of all other penalties which might be imposed by virtue of the fact that the acts constituting an offense under this Statute also constitute separate offenses under other laws of this State.

Elections

Sec. 6. The name of any Communist or of any nominee of the Communist Party shall not be printed upon any ballot used in any primary or general election in this State or in any political subdivision thereof.

Public office

Sec. 7. No person may hold any nonelective position, job or office for the State of Texas, or any political subdivision thereof, where the remuneration of said position, job or office is paid in whole or in part by public moneys or funds of the State of Texas, or of any political subdivision there-

of, where reasonable grounds exist, on all of the evidence, for the employer or other superior of such person to believe that such person is a Communist or a knowing member of a Communist Front Organization.

Enforcement

Sec. 8. The Attorney General of the State of Texas, all District and County Attorneys, the Department of Public Safety, and all law enforcement officers of this State shall each be charged with the duty of enforcing the provisions of this Statute.

Partial unconstitutionality

Sec. 9. If any section, subparagraph, sentence, phrase, part or application of this Statute shall be held unconstitutional, such unconstitutionality shall not affect the validity of the remaining portions hereof, and the Legislature here declares that it would have enacted such remaining portions notwithstanding any holding of unconstitutionality with respect to any other portions of this Statute.

Cumulative character

Sec. 10. This Statute is cumulative of all existing laws and does not repeal any such laws.

Short title

Sec. 11. This Act may be cited as the "Texas Communist Control Law." Acts 1951, 52nd Leg., p. 10, ch. 8.

Historical Note

The Act contained the following preamble: "There exists a world Communist movement, directed by the Union of Soviet Socialist Republics and its satellites, which has as its declared objective world control. Such world control

is to be brought about by aggression, force and violence, such as is now occurring in the Republic of Korea, and is to be accomplished in large part by infiltrating tactics involving the use of fraud, espionage, sabotage, terrorism and treachery. Since the State of Texas is the location of many of the Nation's largest and most vital military establishments, and since it is a producer of many of the most essential products for national defense, the State of Texas is a most probable target for those who seek by force and violence to overthrow Constitutional Government, and is in imminent danger of Communist espionage and sabotage. Communist control of a country is characterized by an absolute denial of the right of self-government and by the abolition of those personal liberties which are cherished and held sacred in the State of Texas and in the United States of America. The world Communist movement, temporarily halted by American dead, constitutes a clear and present danger to the citizens of the State of Texas. Therefore,"

ART. 6889-3A. SUPPRESSION OF COMMUNIST PARTY AND RELATED ORGANIZATIONS

Legislative finding and declaration

Section 1. Upon evidence and proof already presented before this Legislature, Congress, the courts of this State, and the courts of the United States, it is here now found and declared to be a fact that there exists an international Communist conspiracy which is committed to the overthrow of the government of the United States and of the several States, including that of the State of Texas, by force or violence, such conspiracy including the Communist Party of the United States, its component or related parts and members, and that such conspiracy constitutes a clear and present danger to the government of the United States and of this State.

Illegality of Communist Party and component or related organizations; dissolution; forfeiture of charter; property, etc.

Sec. 2. The Communist Party of the United States, together with its component or related parts and organizations, no matter under what name known, and all other organizations, incorporated or unincorporated, which engage in or advocate, abet, advise, or teach, or a purpose of which is to engage in or advocate, abet, advise, or teach, any activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction, or alteration of, the constitutional form of the government of the United States, or of the State of Texas, or of any political subdivision of either of them, by force or violence, are hereby declared to be illegal and not entitled to any rights, privileges, or immunities attendant upon bodies under the jurisdiction of the State of Texas or any political subdivision thereof. It shall be unlawful for such Party or any of its component or related parts or organizations, or any such other organization, to exist, function, or operate in the State of Texas. Any organization which is found by a court of competent jurisdiction to have violated any provisions of this Section, in a proceeding brought for that purpose by the District Attorney, Criminal District Attorney, or County Attorney, shall be dissolved, and if it be a corporation organized and existing under the laws of this State or having a permit to do business in this State, its charter or permit shall be forfeited, and, whether incorporated or unincorporated, all funds, records, and other property belonging to such Party or any component or related part or organization thereof, or to any such other organization, shall be seized by and forfeited to the State of Texas, to escheat to the State as in the case of a person dying without heirs. All books, records, and files of any such organization shall be turned over to the Attorney General.

Registration not evidence

Sec. 3. The fact of the registration of any person under the provisions of Article 6889-3 of the Revised Civil Statutes of Texas as an officer or member of any Communist organization shall not be received in evidence against such person in any proceeding for any alleged violation of this Act.

Prima facie evidence

Sec. 4. As to any particular organization, proof of its affiliation with a parent or superior organization, inside or outside of this State, which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach, any activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction, or alteration of, the constitutional form of the government of the United States, or of the State of Texas, or of any political subdivision of either of them, by force or violence, shall constitute prima facie evidence that such particular organization engages in or advocates, abets, advises, or teaches, or has as a purpose the engaging in or advocating, abetting, advising, or teaching of, the same activities with the same intent.

Unlawful acts

Sec. 5. It shall be unlawful for any person knowingly or willfully to:

(1) Commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction, or alteration of, the constitutional form of the government of the United States, or of the State of Texas, or of any political subdivision of either of them, by force or violence; or

(2) Advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or aid in the commission of any such act, under such circumstances to constitute a clear and present danger to the security of the United States, or of the State of Texas, or of any political subdivision of either of them; or

(3) Conspire with one or more persons to commit any of the above acts; or

(4) Assist in the formation of, or participate in the management of, or contribute to the support of, or become or remain a member of, or destroy any books or records or files of, or secrete any funds in this State of the Communist Party of the United States or any component or related part or organization thereof, or any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach, any activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction, or alteration of, the constitutional form of the government of the United States, or of the State of Texas, or of any political subdivision of either of them, by force or violence, knowing the nature of such organization.

Punishment for violations

Sec. 6. Any person who shall violate any of the provisions of Section 5 of this Act shall be guilty of a felony, and upon conviction thereof shall be fined not more than Twenty Thousand ($20,000.00) Dollars, or imprisoned not less than one (1) year nor more than twenty (20) years in the State penitentiary, or may be both so fined and imprisoned. Provided that nothing in this Act shall be construed to repeal any part of Articles 83, 84, and 85 of the Penal Code of the State of Texas, relating to treason, nor any part of Articles 153 and 155 of the Penal Code of the

State of Texas, relating to seditious writings and language; and provided further, that no person convicted of any violation of this Act shall ever be entitled to suspension or probation of sentence by the trial court.

Disqualification to hold office, etc.

Sec. 7. Any person who shall be convicted finally by a court of competent jurisdiction of violating any of the provisions of this Act shall from the date of such final conviction automatically be disqualified and barred from holding any office, elective or appointive, or any other position of profit, trust, or employment with the government of the State of Texas or any agency thereof, or of any county, municipal corporation, or other political subdivision of the State.

Injunctions

Sec. 8. The District Courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon the application of the State of Texas, acting through the District Attorney, Criminal District Attorney, or County Attorney, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act; no injunction or other writ shall be granted, used or relied upon under the provisions of this Act in any labor dispute or disputes. Such proceedings shall be instituted, prosecuted, tried, and heard as other civil proceedings of like nature in such courts, provided that such proceedings shall have priority over other cases in settings for hearing; provided further, that no such proceeding shall be instituted unless and until the Director of the Texas State Department of Public Safety or his assistant in charge has been notified by telephone, telegraph, or in person of the intention to institute such

proceeding, and an affidavit of such notice filed with the application for such injunction proceedings shall be sufficient for the filing of the same.

Nothing in this Act shall be construed to alter in any way the powers now held by the courts of this State or of this nation under the laws of this State in labor disputes.

Search warrants

Sec. 9. A search warrant may issue under Title 6 of the Code of Criminal Procedure for the purpose of searching for and seizing any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person or organization is violating or has violated any provision of this Act. Search warrants may be issued by any judge of a court of record in this State upon the written application of the District Attorney, Criminal District Attorney, or County Attorney, within their respective jurisdictions, accompanied by the affidavit of a credible person setting forth the name or description of the owner or person in charge of the premises to be searched, or stating that his name and description are unknown, the address or description of the premises, and showing that the described premises is a place where some specified phase or phases of this Act are violated or are being violated, or where are kept any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or written instruments of any kind showing a violation of some phase or phases of this Act; provided that if the premises to be searched constitute a private residence, such application for a search warrant shall be accompanied by the affidavits of two credible citizens. Except as herein provided, the application, issuance, and execution of any such warrant and all proceedings relative thereto shall conform to the applicable provisions of Title 6 of the Code of Criminal Procedure; provided that any evidence

obtained by virtue of a search warrant issued under the provisions of this Act shall not be admissible in evidence in the trial of any proceeding, administrative or judicial, save and except those arising under this Act.

Enforcement of law

Sec. 9a. The Internal Security Section of the Texas Department of Public Safety shall assist in the enforcement of the provisions of this Act, and for such purpose said Department may employ and pay the salaries and wages of such personnel and make such capital outlay purchases as it may deem necessary and pay necessary expenses, including but not limited to travel expenses (including automobile maintenance), all necessary operating expenses (including seasonal help), wages and salaries of employees, and make any and all other expenditures whatsoever necessary for the proper enforcement of the provisions of this Act; and for such purposes there is hereby appropriated out of the Operators and Chauffeurs License Fund such money as may be necessary, not to exceed the sum of Seventy-five Thousand ($75,000.00) Dollars for the biennium ending August 31, 1955. Acts 1954, 53rd Leg., 1st C.S., p. 9, ch. 3.